FILED SEPTEMBER 12, 2014

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **GERALD WILLIAM FILICE,** **Member No. 99657,** A Member of the State Bar.	Case No.: **13-O-13520-PEM** **DECISION**

Introduction[1]

In this disciplinary proceeding, respondent Gerald William Filice is charged with four acts of misconduct stemming from one client matter. The charged misconduct includes: (1) failing to maintain client funds in a trust account; (2) committing an act of moral turpitude by issuing insufficiently funded checks; (3) misappropriating client funds; and (4) failing to cooperate in a State Bar Investigation.

This court finds, by clear and convincing evidence, that respondent is culpable of two of the charged counts. Based upon the culpability, as well as the applicable mitigating and aggravating circumstances, the court recommends that respondent be suspended for two years, stayed, with two years' probation, and 75 days' actual suspension.

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

Significant Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a notice of disciplinary charges (NDC) on February 25, 2014. On March 24, 2014, respondent filed a response to the NDC.

A trial was held on July 2, 2014. The State Bar was represented by Deputy Trial Counsel Heather E. Abelson. Respondent represented himself. On July 2, 2014, the court took this matter under submission.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 1, 1981, and has been a member of the State Bar of California at all times since that date.

Case No. 13-O-13520 – The Chetcuti Matter

Facts

Respondent has been friends with Benny Chetcuti, Jr., for 24 years and has represented him on numerous occasions. In this matter, Chetcuti hired respondent to register two corporations, Professional Lifeguarding & Safety Services, Inc. (Lifeguarding), and Mosta Management Services, Inc. (Mosta), with the California Secretary of State for a flat legal fee of $1,180 that included the cost of incorporation.[2]

[2] The State Bar insists that respondent's withdrawals from his client trust account between March 7 and March 19, 2013, are inconsistent with a flat fee arrangement. This court is not convinced that such withdrawals are clear and convincing evidence that respondent did not have a flat fee arrangement with Chetcuti, given their long-standing friendship and business dealings.

On March 7, 2013, respondent received a check for $1,180 from Chetcuti. He then deposited the payment into his client trust account (CTA) at U.S. Bank. When called as a witness at this hearing, Chetcuti asserted his right against self-incrimination[3] and did not testify.

The Articles of Incorporation for Lifeguarding and Mosta were signed by respondent on March 12, 2013, as the incorporator and filed on March 14, 2013. On the same day, March 14, he issued four checks made payable to the Secretary of State for the incorporation fees, in the amounts of $100, $350, $15, and $100, totaling $565. The checks were drawn from his CTA.

On March 18, 2013, the balance in his CTA was $50.40. Even though there were insufficient funds in the CTA to pay those March 14 checks (NSF checks), U.S. Bank paid the first two checks in the amounts of $100 and $350 on March 19, which were for Lifeguarding. But the bank returned the remaining two checks unpaid in the amounts of $15 and $100 (for Mosta) on April 22.

On April 24, May 16, and May 29, 2013, the State Bar notified respondent that his CTA had a negative account activity during March and April 2013. The letters were sent to respondent's membership address. The letters were not returned to the State Bar. After not receiving a response to the three letters, the State Bar sent a final letter on January 3, 2014.

In that letter, the State Bar explained to respondent that beginning March 19, 2013, through May 1, 2013, he had maintained a negative balance which caused U.S. Bank to close the account. The State Bar requested that respondent provide a written response regarding the negative account activity as well as provide a written trust account journal with each monthly reconciliation from and including December 1, 2011, to and including May 1, 2013. The State

[3] At trial, a federal public defender appeared in camera and convinced this court that Chetcuti's assertion of his right under the Fifth Amendment was proper.

Bar gave respondent until January 13, 2014, to respond to the letter. It also cautioned respondent that any request for an extension of time had to be received by January 13, 2014.

Respondent did not respond to the letters.

Conclusions

Count 1 - (Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account])

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in a client trust account and no funds belonging to the attorney or law firm must be deposited therein or otherwise commingled therewith, except for limited exceptions.

Respondent received the $1,180 payment for fees and costs from his client on March 7, prepared the incorporation documents by March 12, filed the articles on March 14, and wrote four checks made payable to the Secretary of State on March 14, totaling $565.

The State Bar asserts that respondent was required to maintain at least $575[4] of the $1,180 in his CTA on behalf of his client as advanced costs associated with registering two corporations with the California Secretary of State.

Respondent argues that the $1,180 check was erroneously placed in his CTA. The court finds that such a claim is irrelevant to his issuing the four insufficiently funded checks from his CTA.

On March 7, 2013, after respondent deposited the $1,180 check in his CTA, he was required to maintain at least $565 in the trust account for the benefit of Chetcuti to pay the

[4] The State Bar in its pretrial statement requested that the all references to the amount of $580 be changed to $575.

incorporation fees. But by March 18, 2013, respondent had only $50.40 in his CTA. There were insufficient funds to cover the four checks at the time they were presented on March 19 and April 22. Where an attorney's trust account balance fell below the amount of entrusted funds after checks were written but before they cleared, the attorney violated trust account rules. (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113.) Here, respondent failed to maintain the required client funds to be held in trust in his CTA, albeit not a significant amount.

The amount of client trust funds that an attorney mishandles goes to the issue of discipline, not culpability, and the mishandling of even an insignificant amount can constitute a disciplinable offense. No de minimis exception applies to the determination of culpability for mishandling trust funds. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335.)

Thus, respondent failed to maintain a balance of $565 received for the benefit of a client in his client trust account in willful violation of rule 4-100(A).

Count 2 - (§ 6106 [Moral Turpitude])

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

The State Bar contends that from March 19, 2013, through April 22, 2013, respondent repeatedly issued four checks drawn upon his CTA, when respondent knew or was grossly negligent in not knowing that there were insufficient funds in the CTA to pay them, and thereby committed an act involving moral turpitude, dishonesty or corruption in willful violation of section 6106.

Here, respondent's careless mistake in issuing four NSF checks on the same day is not clear and convincing evidence of respondent’s gross negligence, deliberate dishonesty or

corruption or an act involving moral turpitude. They are not numerous checks with insufficient funds for a period of time.

At the hearing in this matter, respondent credibly testified that he did not know that he had insufficient funds in the account and that as soon as he received notice that two of his checks had bounced, he corrected the deficiency by paying the Secretary of State directly.

In short, when he wrote the checks, respondent thought that he had sufficient funds in his CTA. There is no evidence of deception or dishonesty. The court does not believe four checks mistakenly written in one day constitute moral turpitude. Thus, respondent's issuance of four bad checks in a short time range for a negligible amount is not clear and convincing evidence of moral turpitude or dishonesty. Furthermore, he made good on two of the checks by issuing a cashier's check directly to the payee. As for the other checks, he is in a dispute with the bank. Such a negligent trust account violation does not rise to the level of moral turpitude in violation of section 6106. (See *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17.)

Count 3 - (§ 6106 [Moral Turpitude])

The State Bar alleges that respondent dishonestly or grossly negligently misappropriated for his own purposes $575 that respondent's client was entitled to receive and thereby committed an act involving moral turpitude in willful violation of section 6106.

First of all, the purpose of the funds was not for respondent's client to receive but rather, the funds were earmarked to pay for the costs of incorporation. But more importantly, not every trust account violation rises to the level of misappropriation. Because of the serious opprobrium attaching to the term "misappropriation," the term is appropriate only when the level of misconduct rises at least to gross negligence. (*In the Matter of Respondent F, supra,* 2 Cal. State Bar Ct. Rptr. 17, 26.)

Because the court finds that respondent had negligently committed a minor trust account violation and not with gross negligence, respondent did not dishonestly or grossly negligently misappropriated any funds in willful violation of section 6106.

Count 4 - (§ 6068, subd. (i) [Failure to Cooperate])

Section 6068, subdivision (i), provides that an attorney has a duty to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against the attorney.

Respondent claims that he did not receive the April 24, May 16 and May 29, 2013 letters from the State Bar. He says that he did not check his mail because at the time he was on suspension and out of the office as required by the terms of the suspension. He argues that the State Bar could have done more to insure that he got the letters by contacting him by telephone or by email. Respondent admits he received the January 3 letter but that since he received it after the January 13, 2014 deadline for responding, it would have been futile for him by the terms of the letter to ask for an extension.

This court rejects respondent's arguments. No evidence was admitted to explain why he did not receive and respond to the April 24, May 16, and May 29 letters. And, respondent chose not to reply in writing to the January letter when he knew a written reply was necessary, regardless of the deadline.

Therefore, by failing to respond to the State Bar investigator's letters of April 24, May 16, and May 29, 2013, and January 3, 2014, respondent failed to cooperate and participate in a disciplinary investigation pending against him, in willful violation of section 6068, subdivision (i).

Aggravation[5]

Prior Record of Discipline (Std. 1.5(a).)

Respondent has two prior records of discipline.

On November 9, 2011, the State Bar Court Hearing Department issued an order of public reproval with one year of conditions against respondent. Respondent stipulated to a violation of rule 4-100(A) for commingling his personal funds in his client trust account between August 2010 and May 2011. One of the conditions was to attend the Ethics School Client Trust Accounting School. (State Bar Court case Nos. 10-O-10073 et al.)

On November 28, 2013, under Supreme Court Order No. S212773, respondent was suspended from the practice of law for two years, stayed, and placed on probation for two years, and actually suspended for 60 days. Respondent stipulated to misconduct in one client matter and violations of conditions attached to the reproval, which occurred in 2011 and 2012. Respondent's misconduct violated rules 3-410 and 1-110 and section 6068, subdivision (i). Respondent failed to inform his client that he did not have professional liability insurance, failed to cooperate in the State Bar investigation, and failed to comply with six of the conditions attached to the previous reproval. He was again ordered to attend Ethics School Client Trust Accounting School, which he failed to comply with as ordered in the first disciplinary order. (State Bar Court case Nos. 12-O-17874 and 12-H-18229.)

Respondent's current misconduct – trust account violation and failure to cooperate with the State Bar investigation – is similar to that of his previous misconduct. He should have had a heightened awareness of his need for strict compliance with his trust accounting and duty to respond to State Bar's inquiries. His two prior records of discipline are evidence in aggravation.

[5] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Mitigation

Community Service/Pro Bono Work

Community service and pro bono work are mitigating circumstances recognized by case law. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [community service and pro bono activities are mitigating factors that may be entitled to considerable weight].)

Respondent testified that he has provided leadership in the lesbian, gay, bisexual, and transgender (LGBT) community, raised $50,000 for charity, is active in the Imperial Court System[6] of Sacramento, and was elected Emperor. He spent more than 1,000 hours with the Imperial Court. He has volunteered as general counsel for gay and lesbian firefighters and indigent inmates. He has also been a member of the Rotary Club since 1995, a president of the club from 2001 to 2002, and a president of the Midtown Rotary from 2013 to 2014.

Respondent's own testimony regarding his community service may be considered as some evidence in mitigation notwithstanding that it does not meet the requirement that good character be established by a wide range of references. (See *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158.)

Lack of Harm (Std. 1.6(c).)

As soon as he learned from the bank that his CTA checks bounced, respondent issued replacement checks made payable directly to the Secretary of State for the incorporation fees. Thus, the client did not suffer any harm from the NSF checks.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney but to protect the public, the courts, and the legal profession; to maintain the highest possible

[6] The Imperial Court System is one of the oldest and largest LGBT organizations and a grassroots network of organizations that works to build community relationships for equality and raise monies for charitable causes for the benefit of their communities.

professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.1; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 1.7(a) provides that, when a member commits two or more acts of misconduct and the standards specify different sanctions for each act, the most severe sanction must be imposed.

However, standard 1.7(b) provides that if aggravating circumstances are found, they should be considered alone and in balance with any mitigating circumstances, and if the net effect demonstrates that a greater sanction is needed to fulfill the primary purposes of discipline, it is appropriate to impose or recommend a greater sanction than what is otherwise specified in a given standard. On balance, a greater sanction is appropriate in cases where there is serious harm to the client, the public, the legal system, or the profession and where the record demonstrates that the member is unwilling or unable to conform to ethical responsibilities in the future.

Standard 1.8(b) provides that, unless the most compelling mitigating circumstances clearly predominate or the prior misconduct occurred in the same time period as the current misconduct, if an attorney has two or more prior records of discipline, disbarment is appropriate

if: (1) an actual suspension was ordered in one of the prior matters; (2) the prior and current matters together demonstrate a pattern of misconduct; or, (3) the prior disciplinary matters coupled with the current record demonstrate the member's unwillingness or inability to conform to ethical responsibilities.

In this case, standards 2.2(b) and 2.8(b) apply.

Standard 2.2(a) provides that an actual suspension of three months is appropriate for commingling or failing to promptly pay out entrusted funds. Standard 2.2(b) provides that suspension or reproval is appropriate for any other violation of rule 4-100.

Standard 2.8(b) provides that repoval is appropriate for a violation of the duties required of an attorney under section 6068, subdivisions (i), (j), (l), or (o).

The State Bar urges respondent be actually suspended for one year, with a two-year stayed suspension and two-year probation.

Respondent argues that this matter be dismissed because his violations were due to honest mistakes. He claims that unbeknownst to him, he did not have sufficient funds in his CTA when he issued the checks to the Secretary of State. And he contends that he did not respond to the January letter from the State Bar because he thought it was too late.

Although the standards were established as guidelines, "ultimately, the proper recommendation of discipline rest[s] on a balanced consideration of the unique factors in each case." (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

The following cases provide some guidance.

In *Dudugjian v. State Ba*r (1991) 52 Cal.3d 1092, the Supreme Court rejected the application of standard 2.2(a) as requiring three months' actual suspension. The court concluded that public reproval was the appropriate discipline under the facts of the case. There, the attorney honestly believed that the clients had given him permission to retain their settlement

funds, even though he was culpable of willful commingling and failing to promptly pay out client funds.

Similarly, the State Bar Court had privately reproved attorneys who had mishandled client funds by mistake. In *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, the attorney with over 40 years of practice was privately reproved for his aberrational negligence in handling a client's check. When he discovered the mistake nearly three years later, he failed to promptly put the disputed funds in a trust account. Instead, the attorney delayed for a year in resolving the matter, treating it as part of an ongoing fee dispute and leaving the disputed sum of $1,754 in his general account. He had several mitigating circumstances, including no prior record of discipline during long years of practice, extensive pro bono activities and community involvement, and testimony from a great number of character witnesses about the attorney's impeccable honesty and reliability.

In *In the Matter of Bleecker, supra,* 1 Cal. State Bar Ct. Rptr. 113 provides guidance where misappropriation was of a relatively small amount for a relatively brief time, arising out of the attorney's misuse of his trust account as an operating account and the offense did not involve intentional dishonesty. The attorney who had just begun practicing law was actually suspended for 60 days with a two-year stayed suspension and two years' probation for commingling, misappropriation, and using his trust account to avoid a tax levy. His misconduct occurred more than five months and mitigation included no client harm, change of business practices, and no prior or a subsequent record of discipline. The Review Department found that the mitigating factors established that a lesser sanction than that called for in standard 2.2(a) – 90 days minimum suspension for commingling – should be imposed to fulfill the purposes of attorney discipline.

Respondent's misconduct is similar to that of the attorneys in *Dudugjian*, *In the Matter of Respondent E* and *In the Matter of Bleecker* in that he negligently mishandled client funds with no intentional dishonesty. Respondent was definitely wrong in failing to maintain client funds in the client trust account when he wrote four NSF checks in one day. But he corrected his error within a short time and his client was not harmed. No moral turpitude or misappropriation was involved. He also failed to cooperate with the State Bar, which was inexcusable.

In view of respondent's negligence, the recommended level of discipline would have been similar to the above cases discussed but for respondent's two prior records of discipline. Thus, his sanction must be greater than the previously imposed sanction of 60 days' actual suspension. The "paramount concern is protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) The State Bar's recommendation of one year's actual suspension is excessive and respondent's argument for a dismissal is not justified. Under standard 2.2(b), a period of actual suspension is appropriate. At the same time, disbarment under standard 1.8(b) would be manifestly unjust.

Therefore, based on respondent's misconduct, the case law, the aggravating evidence that he had two prior records of discipline, and the mitigating factor that his client was not harmed, the court concludes that a departure from the standards is justified and that, placing respondent on an actual suspension for 75 days would be appropriate to protect the public and to preserve public confidence in the profession. Moreover, respondent's attendance and completion of the State Bar's Ethics School and Client Trust Accounting School is essential in light of his trust account violations in both of his first prior record of discipline and current misconduct.

Recommendations

It is recommended that respondent Gerald William Filice, State Bar Number 99657, be suspended from the practice of law in California for two years, that execution of that period of

suspension be stayed, and that respondent be placed on probation[7] for a period of two years subject to the following conditions:

1. Respondent is suspended from the practice of law for the first 75 days of probation.

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.
3. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.

4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.

5. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.

7. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and of the State Bar's Client Trust Accounting School and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and

[7] The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

respondent will not receive MCLE credit for attending Ethics School or Client Trust Accounting School.[8] (Rules Proc. of State Bar, rule 3201.)

8. At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

Multistate Professional Responsibility Exam

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) because he was previously ordered to do so in S212773.

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: September _____, 2014

PAT McELROY
Judge of the State Bar Court

[8] Rule 5.135 of the Rules of Procedure of the State Bar provides that an attorney must satisfactorily complete the State Bar's Ethics School unless the attorney has completed the course within the prior two years.